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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

No. 202.

VICENTE SERRA AND MARIA OBLENO,
PLAINTIFFS IN ERROR,

vs.

ADRIANO MURTIGA.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFFS IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
MAURICE KELLY,
Counsel for Plaintiffs in Error.

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Statement.

This case is brought here by writ of error to the Supreme Court of the Philippine Islands (Rec., 36) to review the judgment of that court (Rec., 31) affirming the judgment of the Court of First Instance of the Province of Albay (Rec., 23-24) convicting Vicente Serra and Maria Obleno, the plaintiffs in error, of the crime of adultery.

The complaint under which these plaintiffs in error were tried and convicted is as follows (Rec., 1):

"THE UNITED STATES OF AMERICA,
"Philippine Islands, Eighth Judicial District:

"IN THE COURT OF FIRST INSTANCE OF ALBAY.

"THE UNITED STATES and MACARIO MERCADES, in "Behalf of ADRIANO MORTIGA,
"*v.*
"VICENTE SERRA and MARIA OBLENO.

" The undersigned, a practicing attorney, in behalf " of Adriano Mortiga, the husband of Maria Obleno, " accuses Vicente Serra and the said Maria Obleno " of the crime of adultery, committed as follows:

" That on or about the year 1899, and up to the " present time, the accused, being both married, ma- " liciously, criminally, and illegally lived as husband " and wife, and continued living together up to the " present time, openly and notoriously, from which " illegal cohabitation two children are the issue, " named Elias and José Isabelo, without the consent " of the prosecuting witness, and contrary to the stat- " ute in such cases made and provided.

"(Signed) MACARIO MERCADES,
"Attorney at Law.
"(Signed) ADRIANO MORTIGA.

"ALBAY, *February* 24, 1904.

"Sworn and subscribed to before me this 24th day " of February, 1904.
"(Signed) F. SAMSON, *Clerk.*

" Witnesses:
" ADRIANO MORTIGA.
" BERNARDO MORTIGA.
" EULALIO MORTIGA.
" PLACIDO SOLANO.
" CASIMIRA MARIAS."

On the same day on which this complaint was filed plaintiffs in error were arraigned in the Court of First Instance

and pleaded not guilty (Rec., 2). After trial had, the Court of First Instance found defendants (plaintiffs in error) guilty, judgment being rendered as follows (Rec., 24):

> "It is the judgment of this court that Vicente Serra and Maria Obleno are guilty of the crime of adultery, as charged in the complaint, for which they must suffer the penalty of two years, four months, and one day of imprisonment, and that they each pay one-half of the costs."

Thereafter plaintiffs in error appealed to the Supreme Court of the Philippine Islands, assigning, among other errors, that—

> "The complaint is null and void because it lacks the essential requisites provided by law" (Rec., 25-26).

The Supreme Court of the Philippines affirmed the judgment of the Court of First Instance so far as it convicted the accused of the crime of adultery, modifying it, however, as respects the sentence by increasing the sentence imposed to three years and six months for each of the defendants (Rec., 27, 31). The court refused to consider the objections raised as to the sufficiency of the complaint in matters of substance, saying (Rec., 27):

> "Objections to the complaint based upon an insufficient statement of the facts constituting the offense cannot be considered here, because they were not presented in the court below."

Thereafter the accused prayed a rehearing, alleging among other reasons therefor (Rec., 28-9):

> "1. Because by the decision of this court the defendants have been required to answer to a criminal charge without notice of the nature and cause of the complaint against them. The complaint in this case does not contain the essential requisites provided by

law, and the defendants, particularly Vicente Serra, have been convicted upon a complaint which charges no crime.

"2. Because the defendants have been required to answer a criminal accusation without due process of law."

Petition for rehearing was denied by the Supreme Court of the Philippines and judgment entered as of date October 9, 1905 (Rec., 31). Upon this judgment the pending writ of error was sued out.

Specification of Errors.

I.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, said persons having been arraigned, tried, and convicted without being informed of the nature and cause of the accusation against them, in violation of the provisions of the sixth amendment to the Constitution of the United States, and of section 5 of the act of Congress approved July 1, 1902, chapter 1369.

II.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, said persons having been held to answer to a criminal offense and deprived of liberty without due process of law, in violation of the provisions of section 5 of the act of Congress approved July 1, 1902, chapter 1369, and of the Constitution of the United States.

III.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, the complaint upon which such judgment of conviction is based being defective in substance, in that it fails to state an essential element of the crime of adultery, to wit, that the accused man, said Vicente Serra, knew that the accused woman, said Maria Obleno, was married at the time the alleged acts of adultery were committed.

IV.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, the complaint upon which said judgment of conviction is based being defective in substance, in that it fails to allege any place where the alleged acts of adultery were committed, or to show that such acts were committed at any place within the jurisdiction of the court.

V.

The Supreme Court of the Philippine Islands erred in holding that they could not consider objections that the complaint did not state facts constituting the crime of adultery, because such objections were not presented in the court below.

ARGUMENT.

Before proceeding to the discussion of the particular questions of law, in the decision of which we claim the court below erred, we think it proper to state some of the general provisions of the Philippine laws relative to criminal procedure, and particularly with reference to the prosecution of "private crimes." The offense of adultery, under the Spanish law and under the law now in force in the Philippines, comes within that class of offenses designated as private crimes—*i. e.*, offenses which are regarded by the Spanish law as wrongs against private individuals rather than against the public peace or welfare, which may be pardoned by the individual who is wronged and which can be prosecuted only by him. While such offenses are punishable by imprisonment, pecuniary indemnification of the person wronged is also provided for. Crimes of this nature are treated by the Penal Code as distinct from public offenses, and are prosecuted upon complaint, while public offenses are prosecuted upon information.

General Orders No. 58, of April 23, 1900 (Phil. Pub. Laws, vol. I, pp. 1083-1095), amending the Code of Criminal Procedure, contains the following provisions with reference to the prosecution of public offenses and private crimes:

> "SEC. 2. All prosecutions for public offenses shall be in the name of the United States against the person charged with the offenses.
>
> "SEC. 3. All public offenses triable in courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.
>
> "SEC. 4. A complaint is a sworn written statement made to the court or magistrate that a person has been guilty of a designated offense.
>
> "SEC. 5. An information is an accusation in writing charging a person with a public offense, presented

and signed by the promoter fiscal or his deputy and filed with the clerk of the court.

"SEC. 6. A complaint or information is sufficient if it shows:

"1. The name of the defendant, or, if his name cannot be discovered, that he is described under a fictitious name, with a statement that his true name is unknown to the informant or official signing the same. His true name may be inserted at any stage of the proceedings instituted against him, whenever ascertained.

"2. The designation of the crime or public offense charged.

"3. The acts or omission complained of as constituting the crime or public offense in ordinary and concise language, without repetition, not necessarily in the words of the statute, but in such form as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to right.

"4. That the offense was committed within the jurisdiction of the court and is triable therein.

"5. The names of the persons against whom, or against whose property, the offense was committed, if known."

* * * * * * *

"SEC. 9. The information or complaint may be amended in substance or form, without leave of court, at any time before the defendant pleads; and thereafter, during the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant.

"SEC. 10. No information or complaint is insufficient nor can the trial, judgment, or other proceedings be affected by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits."

* * * * * * *

"SEC. 107. The privileges now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution of the

offense and to recover damages for the injury sustained by reason of the same shall not be held to be abridged by the provisions of this order; but such person may appear and shall be heard either individually or by attorney at all stages of the case, and the court upon conviction of the accused may enter judgment against him for the damages occasioned by his wrongful act. It shall, however, be the duty of the promoter fiscal to direct the prosecution, subject to the right of the person injured to appeal from any decision of the court denying him a legal right."

In the case of *Gibbs vs. McDougal,* the Supreme Court of the Philippines, in decisions dated May 19 and November 20, 1903, held that the crime of adultery could only be prosecuted upon complaint of the injured husband or wife, and that the Government could not take part in the prosecution, saying by Mr. Chief Justice Arellano:

"(2) Whether the Government is entitled or not to take part in this case.

"The principal question on the merits cannot be taken into consideration by this court because it has not yet been considered by the court *a quo*. A matter which has not been passed upon in the trial court cannot be brought into issue or decided in the appellate court. The court below did nothing more than to refuse to allow the filing of the petition of the 4th of November, in which a motion was made for the dismissal of the case because the judge was of the opinion that it did not comply with the requirements of G. O., 58.

"With respect to the questions of form, the only issues which can now be decided—the one with respect to the capacity of the solicitor general to take part in this case—must be passed upon before going into the motion brought by him, and consequently the court must first decide this point.

"The solicitor general is without capacity to intervene in cases of this class. The rule laid down by the Penal Code is explicit: 'No penalty shall be imposed for the offense of adultery except upon the

complaint of the injured husband.' This is one of the crimes of an essentially private character which cannot be prosecuted in accordance with the precepts of the Penal Code except at the instance of the party aggrieved, and this is an offense most essentially of a private character because it cannot be prosecuted except upon the complaint and formal instance of a single person."

* * * * * * *

"Even with respect to private crimes which the Penal Code separates from public actions, there can be no other form of procedure than that contained in general order 58. This has been demonstrated by not a few cases which have been prosecuted for crimes against chastity and honor and brought to a final termination without objection. No objection was raised, nor could it have been raised, that these cases were not properly commenced because of the lack of an information—a formal accusation which pertains to the prosecuting officers alone—because in all of them there has been an accusation adequate to the private action and recognized in the new procedural law, to wit, the complaint. The complaint was defined and regulated on identical terms with the information, and in order that it might serve as a basis for a prosecution and in order to distinguish it from the form reserved for the action of public prosecuting officers, the concept of public crimes, which implies the necessity of an information, was purposely omitted. The complaint is therefore a mode of action which is the auxiliary of the information with respect to public offenses and is the principal and sole means of prosecution with respect to private crimes."

The foregoing decisions are not reported, but the cause (No. 42, October term, 1905) was before this court on writ of error at the last term, and the decisions are set forth in the printed transcript of record therein at pages 17 and 19.

In an opinion rendered August 5, 1903, the Attorney Gen-

eral of the Philippines said (1 Att'y Gen'l's Op., Phil., 651, 652):

> "'(3) Can the provincial fiscal take action in private crimes, such as adultery, slander, and calumny?'
> "This question was authoritively determined by the Supreme Court of the Philippine Islands in the case of *United States vs. Gibbs* and *MacDougall*. In said case the court decided that private crimes are to be prosecuted, if at all, by the private attorney of the aggrieved parties, and that the fiscal should not take part in such proceedings."

And this is in accordance with Spanish law and authority. In commenting upon article 449 of the Reformed Penal Code of Spain of 1870, which corresponds to article 433 of the Philippine Penal Code, Escriche says (Dic. de Leg. y Jur., Ed. 1874, Tomo I, fol. 324, tit. Adulterio):

> *"Acerca de la persona que puede acusar á los adulteros, de que se hace cargo el autor en el párrafo 9° de este articulo, el nuevo Código penal ha ratificado lo prescrito por la ley 4, tit. 26, lib. 12 de la Nov. Recop., que solo concedia esta accion al marido. Segun el art. 449 del Código penal reformado de 1870 no se impone pena por el delito de adulterio, sino en virtud de querella del marido agraviado; en los arts. 4 y 6 de la ley provisional de Enjuiciamiento criminal de Setiembre de 1872 se ratifica esta disposicion, la cual se funda en que, si bien los delitos de sensualidad, y en especial el de adulterio, como atentatorios contra la severidad de las costumbres, que es uno de los vinculos mas fuertes de los familias y de la sociedad, deben ser castigados por el legislador, la ley social debe penarlos solamente cuando se cometen con perjuicio de tercero, dejando á este la facultad de reclamar su castigo y de hacerlos publicos; mas no en el caso contrario y cuando permanezcan en secreto, porque la acusacion publica y las diligencias para averiguar su perpetracion abririan el santuario del hagar deméstico y someterian la vida privida y las acciones intimas á procedimientos que perjudicarian á la moral y al buen ejemplo. Asi, pues, cuando el*

inmediatamente interesado en su castigo no se presenta á promoverlo, el legislador ha dejado la reprobacion y penalidad de tales delitos á la conciencia y la honestidad publicas y al juicio justo y severo de la Divinidad."

The provisions of the Philippine Penal Code relative to the crime of adultery are contained in Chapter I of title IX, articles 433 to 437, inclusive, and are as follows:

"ART. 433. Adultery shall be punished with the penalty of *prisión correccional* in its medium and maximum degrees.

"Adultery is committed by a married woman who lies with a man not her husband, and by him who lies with her *knowing that she is married,* although the marriage be afterwards declared void.

"ART. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.

"The latter can enter a complaint against both guilty parties, if alive, and never, if he has consented to the adultery or pardoned either of the culprits.

"ART. 435. The husband may at any time obtain the remission of the punishment imposed upon his wife.

"In such case the adulterer's penalty shall also be considered as remitted.

"ART. 436. The final judgment rendered in a suit for divorce on the ground of adultery shall have full effect as to penal consequences, if it absolves the respondents.

"If the judgment is condemnatory of the respondents, however, a new proceeding shall be necessary in order to impose penalties upon them.

"ART. 437. The husband who shall keep a concubine in his home, or out of it with scandal, shall be punished with the penalty of *prisión correccional* in its minimum and medium degrees.

"The concubine shall be punished with banishment.

"The provisions of articles 434 and 435 are applicable to the case referred to in this article."

From the foregoing provisions of the Penal Code it will be seen that there are two separate and distinct crimes defined under the general head of adultery.

(1) That defined by article 433—*i. e.*, the carnal intercourse of a man with a married woman not his wife, the man knowing the woman to be married at the time of the act; and of a married woman with a man not her husband. It is immaterial to the commission of this offense whether the guilty man be married or not; to sustain conviction, however, the man must know when he commits the act that the woman is married. The parties guilty of this offense can only be prosecuted by the injured husband, and each is subject to like punishment.

(2) That defined by article 437—*i. e.*, the cohabitation of a married man with a woman not his wife, in his own home, or outside of it with scandal. The man and his concubine are both guilty, but are punishable in different ways—the man by *prisión correccional* in minimum or medium degree, the concubine by banishment. It is immaterial to this offense whether the guilty woman be married or not. It is, of course, essential that the man be married, and the cohabitation must be either in the man's home, or if not in his home it must be accompanied by scandal. Prosecution of this offense must be by the injured wife. It is at once apparent that this crime is not the one for which plaintiffs in error have been prosecuted and of which they have been convicted, since the complaint in this case is made by an alleged injured husband—not an injured wife; there is no allegation that Serra lived with Señora Obleno in his own home, nor that he lived with her out of his home with scandal; and the punishment to which Señora Obleno has been sentenced is imprisonment, not banishment.

It is hence clear that the crime of which plaintiffs in error have been convicted and for which they are under sentence is that defined by article 433 of the Penal Code.

I.

First and Third Specifications of Error.

The complaint herein fails to state the essential elements of the crime of adultery, and is hence fatally defective. In entering judgment of conviction thereon, the court below violated the fundamental guarantees of the Constitution and of the Philippine Bill of Rights.

Article 433 of the Philippine Penal Code, *supra,* makes the knowledge by the male defendant of the fact that his female codefendant was married an essential element of the crime.

> "Adultery is committed by the married woman who lies with a man not her husband, and by him who lies with her *knowing that she is married.*"

Unless, when the man lies with the woman, he knows her to be married, he has not committed the crime of adultery; and unless the complaint states that the man lay with the woman, knowing her to be married, it does not charge the crime of adultery. Inspection of the complaint, *ante,* page 2 (Rec., 1), at once discloses that it nowhere, directly or indirectly, formally or informally, states that the defendant Serra knew that his codefendant, Señora Obleno, was married, either at the time of the acts complained of or at any other time. The charging part of the complaint is as follows:

> "That on or about the year 1899, and up to the present time, the accused, being both married, maliciously, criminally and illegally lived as husband and wife, and continued living together up to the present time, openly and notoriously, from which

> illegal cohabitation two children are the issue, named Elias and José Isabelo, without the consent of the prosecuting witness, and contrary to the statute in such cases made and provided."

The complaint, failing to charge this essential element in the crime of adultery, is defective in its substance—fatally defective—and it cannot support any valid conviction.

It is fundamental law, in prosecutions for either statutory or common-law offenses, that the indictment, information, or complaint must set forth clearly and accurately every "element necessary to constitute the offense intended to be punished"—"all the ingredients of which the offense is composed." An indictment, information, or complaint which does not so charge every essential element of the offense is defective in substances, is not cured by verdict or judgment, and cannot support a valid conviction. It may be quashed on motion, or judgment thereon may be arrested, or may be reversed on error. This court has repeatedly so decided. Thus in *United States vs. Cook,* 17 Wall., 168, this court said (p. 174):

> "Offenses created by statute, as well as offenses at common law must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.
>
> "With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error."

And in *United States vs. Cruikshank*, 92 U. S., 542-557, the court, by Mr. Chief Justice Waite, held:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills*, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States v. Cook*, 17 Wall., 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.
>
> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for

such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. *State v. Parker,* 43 N. H., 83; *State v. Keach,* 40 Vt., 118; *Alderman v. The People,* 4 Mich., 414; *State v. Roberts,* 34 Me., 32. In Maine, it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State v. Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison.' All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

In *Evans vs. United States,* 153 U. S., 584, Mr. Justice Brown, speaking for the court, thus reviews the authorities (p. 587):

"A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in United States *v.* Mills, 7 Pet., 138, that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll,* 105 U. S., 611, 612, 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States v. Cook,* 17 Wall., 168, 174; *United States v. Cruikshank,* 92 U. S., 542, 558. 'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' *United States v. Carll,* 105 U. S., 611.

"Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *United States v. Simmons,* 96 U. S., 360; *United States v. Hess,* 134 U. S., 483; *Pettibone v. United States,* 148 U. S., 197; *In re Greene,* 52 Fed. Rep., 104."

In *Cochran and Sayre vs. United States,* 157 U. S., 286, the court, by Mr. Justice Gray, speaking of the rule by which the sufficiency of an indictment must be judged, said (p. 290):

"The true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged,

> and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

Where knowledge of some fact by the accused is an essential ingredient of the offense and is not implied in the statement of the act itself, that knowledge must be specifically alleged. Thus in *United States vs. Carll,* 105 U. S., 611, the indictment was found under section 5431, United States Revised Statutes, which provides that "every person who, with intent to defraud, passes, utters, publishes, or sells any falsely made, forged, counterfeited or altered security of the United States, shall be punished," etc. The indictment in setting forth the offense followed the words of the statute, and did not allege that the accused *knew* the described instruments to be false, forged, counterfeited or altered. This court held that knowledge on the part of the accused was an essential element of the offense, since without such knowledge there could be no intent. For want of such specific allegation of knowledge, it was held that the indictment was fatally defective, and was insufficient after verdict to warrant judgment thereon, saying by Mr. Justice Gray (p. 612):

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *United States v. Cruikshank,* 92 U. S., 542; *United States v. Simmons,*

96 *id.*, 360; *Commonwealth v. Clifford,* 8 Cush. (Mass.), 215; *Commonwealth v. Bean,* 11 *id.*, 414; *Commonwealth v. Bean,* 14 Gray (Mass.), 52; *Commonwealth v. Filburn,* 119 Mass., 297.

"The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common-law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

"This indictment, by omitting the allegation contained in the indictment in *United States v. Howell* (11 Wall., 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of sect. 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be answered in the negative."

Pettibone vs. United States, 148 U. S., 196, was a prosecution brought under section 5399, United States Revised Statutes, for conspiracy, corruptly and by threats and force to obstruct the administration of justice in a court of the United States. It was held that in order to support the charge of conspiracy it must be shown that those alleged to have conspired had knowledge or notice or information of the pendency of proceedings in the United States court, and in order to support a conviction this knowledge must be specifically averred in the indictment. The Chief Justice, speaking for the court, said (p. 202):

"The confederacy to commit the offense is the gist of the criminality under this section, although to complete it some act to effect the object of the conspiracy is needed. *United States v. Hirsch,* 100 U. S., 33.

"This is a conviction for conspiracy, corruptly and by threats and force to obstruct the due administration of justice in the Circuit Court of the United States for the District of Idaho, and the combination of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States v. Hess,* 124 U. S., 483, 486. And in *United States v. Britton,* 108 U. S., 199, it was held, in an indictment for conspiracy under section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy." * * *

(Page 204:) "The construction that applies to the first branch of section 5399 must be applied to the second, and if it were essential that the person accused should know that the witness or officer was a witness or officer in order to conviction of the charge of influencing, intimidating, or impeding such witness or officer in the discharge of his duty, so it must be necessary for the accused to have knowledge or notice or information of the pendency of proceedings in the United States court, or the progress of the administration of justice therein, before he can be found guilty of obstructing, or impeding, or endeavoring to obstruct or impede the same.

"In *United States v. Bittinger,* 15 Am. L. Reg. (N. S.), 49, it was held that a person is a witness under section 5399 of the Revised Statutes who is designated as such, either by the issue of a subpœna or

by the endorsement of his name on the complaint, but that before any one could be said to have endeavored to corruptly influence a witness under that section, he must have known that the witness had been properly designated as such. *United States v. Kee,* 39 Fed. Rep., 603.

"In *United States v. Keen,* 5 Mason, 453, it was ruled by Mr. Justice Story and Judge Davis, that it was no defense to an indictment for forcibly obstructing or impeding an officer of the customs in the discharge of his duty that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duty, if he knew the officer to be so engaged.

"In cases of that sort it is the official character that creates the offense and the scienter is necessary. *King v. Osmer,* 5 East, 304; *King v. Everett,* 8 B. & C., 114; *State v. Carpenter,* 54 Vermont, 551; *State v. Burt,* 25 Vermont, 373; *State v. Maloney,* 12 R. I., 251; *State v. Downer,* 8 Vermont, 424, 429; *Commonwealth v. Israel,* 4 Leigh, 675; *Yates v. People,* 32 N. Y., 509; *Commonwealth v. Kirby,* 2 Cush., 577; *State v. Hilton,* 26 Missouri, 199; *State v. Smith,* 11 Oregon, 205; *Horan v. State,* 7 Tex. App., 183; *Duncan v. State,* 7 Humph., 148; *State v. Hailey,* 2 Strobh. (Law), 73; *State v. Beasom,* 40 N. H., 367.

"This is so whenever knowledge is an essential ingredient of the offense and not implied in the statement of the act itself. Whart., Cr. Pl. & Pr., sec. 164.

"Under section 5398, every person who knowingly and willfully obstructs, resists or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule of or order of any court of the United States, may be imprisoned and fined. It was held in *United States v. Tinklepaugh,* 3 Blatchford, 425, that an indictment under this section must distinctly state and charge that a legal process, warrant, etc., was issued by a court of the United States, and was in the hands of some officer of the United States for service who had authority to serve the same, and that after such process was in the hands of the officer for service

some one knowingly and willfully obstructed, resisted or opposed him in serving or attempting to execute the same. And in *United States v. Stowell*, 2 Curtis, 153, it was decided that an averment that the warrant resisted was issued by a commissioner was not good, but the facts constituting the due issue must be recited, and the absence of an averment that the commissioner who issued the warrant was thereto authorized, could not be aided by referring to the court records. *United States v. Wilcox*, 4 Blatchford, 391.

"It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."

A fortiori, where the statute itself makes knowledge or intent an essential element of the offense, the knowledge of the accused must be specifically alleged. Thus in *United States vs. Slenker,* 32 Fed. Rep., 691, the court said (p. 694):

"The jury in this case having found a verdict of guilty, the defendant moves the court in arrest of judgment, on the ground that it is not alleged in either count of the indictment that the defendant knew the writings, papers, publications, etc., charged to have been by her deposited in the mail, were of an obscene, lewd, and lascivious character. She is charged in the indictment with unlawfully and knowingly depositing, and causing to be deposited, in the mail, for mailing and delivery, certain obscene, lewd, and lascivious writings, papers, etc., but there is no allegation that she knew the papers, writings, etc., to be lewd, etc.

"The *scienter,* when necessary to be alleged in an

indictment, is matter of substance, and not of form, and its omission is not cured by section 1025 of the Revised Statutes. The district attorney insists that as the indictment is in the language of the statute, it is sufficient. This is the general rule as to sufficiency in describing the offense; but where something more is necessary, such as the allegation of guilty knowledge, then the language of the statute is not always sufficient."

* * * * * * *

"Let us apply this rule to the case before us. The defendant is charged with knowingly depositing, and causing to be deposited, in the mail, for mailing and delivery, certain obscene papers, etc. She may knowingly have done this; she may knowingly have caused it to be done, and yet be entirely ignorant of the obscene character of the writings, etc., so deposited, and consequently not guilty of the offense described in the statute. 'Knowingly,' in the indictment, must be limited to the *act* of depositing, for mailing and delivery, the obscene matter in the mail, and cannot be extended to include a guilty knowledge of the writings, papers, etc.

* * * * * *

"The court is of the opinion that the indictment does not set forth the offense with clearness and all necessary certainty, so as to apprise the accused of the crime with which she stands charged, and every ingredient of which the offense is composed is not accurately and clearly alleged. It is defective because it does not allege that the defendant knew that the writings, papers, etc., which she is charged with having deposited in the mail, for mailing and delivery, were of an obscene, lewd, and lascivious character. This conclusion is clearly sustained by principle and precedent; and the motion in arrest of judgment must be sustained."

See also *United States vs. Trumbull*, 46 Fed. Rep., 755.

And these principles apply as well to proceedings instituted upon information or complaint as to those brought upon indictment, and to courts of civil law or admiralty jurisdiction as to those of common law. In *The Hoppet vs. United States,* 7 Cranch, 389, this court, by Chief Justice Marshall, said (p. 393):

> "It is not contended that all those technical niceties which are unimportant in themselves, and standing only on precedents of which the reason cannot be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute. It would require a series of clear and unequivocal precedents to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offenses against municipal law.
>
> "It is, upon these and other reasons, the opinion of the court, that the information is not made good by the allegation that the offenses was committed against the provisions of certain sections of the act of Congress.
>
> "Is it cured by any evidence showing that in point of fact the vessel and cargo are liable to forfeiture?
>
> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.
>
> "The reasons for this rule are:
>
> "1st. That the party accused may know against what charge to direct his defense.
>
> "2d. That the court may see, with judicial eyes, that the fact alleged to have been committed is an offense against the laws, and may also discern the

> punishment annexed by law to the specific offense. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is, therefore, a maxim of the civil law that a decree must be *secundum allegata* as well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts."

The foregoing principles have been recognized by the Supreme Court of the Philippine Islands in the case of *United States vs. Salcedo*, 3 Off. Gaz., 195, in which Mr. Justice Johnson, speaking for the court, says (p. 196):

> "Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in the complaint. No complaint, whether for a statutory crime or a crime at common law, will be held to be good if it does not accurately and clearly allege all of the ingredients of which the offense is composed. In other words, the complaint must state all the facts and circumstances which go to make up the offense as defined in the statute or by the common law so as to bring the defendant precisely within it. * * * A complaint will be sufficient if it describes the offense in the language of the statute whenever the statute contains all of the essential elements constituting the particular offense. Of course it need not be stated that the names of the parties and the time and *place* of the commission of the offense must also be alleged in connection with the description of the offense."

It may be contended that the defect in the complaint which has just been pointed out relates only to the plaintiff in error, Vicente Serra; that its sufficiency as against his co-defendant, Señora Obleno, is not thereby affected. We do not think such contention would be sound. Where two are jointly indicted for the offense of adultery and the prosecution fails as to one, the case should be dismissed as to the other. *State vs. Parham*, 5 Jones (N. C.), 416; *State vs. Mainor*, 6 Ired., 340.

This specially applies to the crime of adultery under the Philippine and Spanish laws. The intent of the statutes is plain that one of the codefendants shall not be subjected to prosecution or punishment except the other be likewise prosecuted and punished.

The second paragraph of article 434 of the Philippine Penal Code, *supra*, seems to have been incorrectly translated, thereby losing some of its force. It is given thus in the official translation:

> "ART. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.
>
> "*The latter can enter a complaint against both guilty parties, if alive,* and never, if he has consented to the adultery or pardoned either of the culprits."

The Spanish text is as follows:

> "ART. 434. *No se impondrá pena por delito de adulterio sino en virtud de querella del marido agraviado.*
>
> "*Este no podra deducirla sino contra culpables, si uno y otro vivieren, y nunca si hubiere consentido el adulterio ó perdonado á cualquiera de ellos.*"

Manifestly a more correct translation of the second paragraph of this article would be:

> "The latter cannot present it [the complaint] except against both guilty parties if both are alive, and never, if he shall have consented to the adultery or pardoned either of them [the culprits]."

Thus the injured husband cannot proceed except against both parties to the offense, if both are alive, and against neither if he shall have pardoned one.

Again, Article 435 of the Penal Code, *supra*, provides:

> "ART. 435. The husband may at any time obtain the remission of the punishment imposed upon his wife.
>
> "In such case the adulterer's penalty shall also be considered as remitted."

Clearly, then, the law does not contemplate the prosecution of one of the offending parties without the prosecution of the other, if he or she be alive, nor the punishment of one of them, if the other escape punishment.

This is the effect of the Spanish law and authorities. Escriche, commenting upon articles 448 and 449 of the Spanish Penal Code of 1870, corresponding to articles 434 and 435 of the Philippine Penal Code, says (Tom. I, fol. 324):

> *"Segun el pár. 2.° dicho art. 449, el marido no puede deducir la querella, sino contra ambos culpables, si uno y otro vivieren, y nunca si hubiera consentido el adulterio ó perdonado á algun de ellos. No es, pues, permitido al marido perseguir solamente al coautor del adulterio con su mujer; disposicion que se funda en evitar los abusos y venganzas contra determinadas personas, á pretexto de adulterio, y en que la persecucion contra el coautor recaeria ó se reflejaria en la mujer, produciendo las mismas consecuencias que la acusacion intentada directamente contra esta.*
>
> *"Mas no solamente limita la ley la facultad de acusar de este delito á solo el marido, sino que hasta le concede la de remitir en cualquier tiempo la pena á su consorte, segun el art. 450 del Código penal reformado, conforme en este con lo prescrito por la ley 4, tit. 26, lib. 12 de la Nov. Recopilacion, si bien en este caso se tendrá tambien por remitida la pena al adultero segun el pár. 2 del art. citado del Código penal.*
>
> * * *
>
> *"La disposicion del par. 1° del art. 450 se funda en que siendo el adulterio una falta de fidelidad al afecto conyugal, es natural que se permita al marido su perdon; y la del. pár. 2° de dicho articula en las mismas consideraciones que la disposicion del art. 449, ya expuesta."*

II.

Second and Third Specifications of Error.

The complaint herein fails to state any place where the alleged acts of adultery were committed, or to show that they were committed anywhere within the jurisdiction of the court, and is hence fatally defective. The court below in entering judgment of conviction thereon violated the fundamental constitutional guarantees of the Philippine Bill of Rights.

The complaint in this case contains no statement whatever as to the place where the alleged acts of adultery were committed. There is nothing even to show that such acts were committed anywhere within the jurisdiction of the court. For aught in the complaint, they might have been committed in Spain or in the United States, or anywhere else outside of the Province of Albay and the Philippine Islands, in which event the court below would have had no jurisdiction.

It is elementary that an indictment, information, or complaint, in order to sustain a valid conviction, must state with some degree of definiteness the place where the offense was committed, and must always show that it was committed at some place within the jurisdiction of the court. Of course, where no place whatsoever is alleged, the indictment or complaint shows on its face that it is fatally defective. This rule is recognized by the law governing criminal practice in the Philippines.

General Orders No. 58, 1900, section 6, *supra*, requires the complaint or information to show "that the offense was

committed within the jurisdiction of the court and is triable thereunder."

In *United States vs. Betiong*, 2 Phil., 126, the Supreme Court of the Philippines reversed the judgment of conviction, because "The place where the alleged crime was committed is not stated in the complaint."

The principle that an indictment, complaint, or information must allege some *locus* of the offenses is universal (Bishop's Crim. Pro.(4th ed.), vol. I, chap. XXIV; Wharton's Crim. Pl. & Pr. (9th ed.), secs. 139–150). The reasons for it are obvious: (1) That the accused may be informed of the charge in this respect—the nature and cause of the accusation—and be prepared to meet it; (2) that the trial court may see that it has jurisdiction of the offense; and (3) that the judgment rendered thereon may be so definite that the defendant may avail himself of it in plea of former acquittal or conviction. In a larger sense, it is essential because of the fundamental principle that the verdict and judgment must be responsive to the charge, because they are based on the charge and because neither verdict nor judgment can be larger than the charge.

As said in the case of *The Hoppet, supra*, under the civil law as well as under our system of jurisprudence, judgment or decree "must be *secundum allegata* as well as *secundum probata*—a maxim essential to the due administration of justice in all courts."

All authorities hold that the indictment or compiaint must show that the offense was committed within the court's jurisdiction. Thus in *United States vs. Wood*, 2 Wheeler Cr. Cas., 325; 28 Fed. Cas., No. 16,757, Mr. Justice Washington, sitting on circuit, held (p. 761):

> "It is indispensable that the indictment should distinctly show that the court has jurisdiction of the offense, and it ought, therefore, to have laid it to have been committed in the eastern district. And since it might be proper in some cases of a capital nature

> to try the cause in the county where the offense was committed, there would seem to be a propriety in stating the county also in the indictment, though on this point we give no positive opinion at this time, the case not requiring it. Upon the whole, we are of opinion that the judgment must be arrested for the reason which has been stated."

And in *United States vs. Anderson*, 17 Blatchf., 238; Fed. Case No. 14,448, a prosecution under section 5346, United States Revised Statutes, for an assault committed at a place within the jurisdiction of the United States "and out of the jurisdiction of any particular State," Judge Benedict quashed the indictment which alleged the assault to have been committed on board a vessel "in the harbor of Guantanamo, in the island of Cuba, on waters within the admiralty jurisdiction of the United States," because it failed to state that the place was out of the jurisdiction of any State of the United States, saying:

> "The act charged is an assault with a dangerous weapon on board the brig *Sarah and Emma*, a vessel belonging in whole or in part to a citizen of the United States, in the harbor of Guantanamo, in the island of Cuba, on waters within the admiralty jurisdiction of the United States. The objection taken to this indictment is, that it contains no averment that the place where the offense is said to have been committed is out of the jurisdiction of any of the States of the Union. In the case of *U. S. v. Jackelow*, 1 Black (66 U. S.), 484, it was held by the Supreme Court of the United States that the question whether a particular place be out of the jurisdiction of any State, when material in determining the extent of the jurisdiction of a court, is a question of fact, to be passed on by the jury; and, in that case, the Supreme Court set aside a special verdict which found the offense to have been committed in waters adjoining the State of Connecticut, between Norwalk Harbor and Westchester county, in the State of New York, at a point five miles eastward of Lyons' point (which is the boundary between the States of New

> York and Connecticut) and one mile and a half from the Connecticut shore at low-water mark, upon the ground that, in the absence of a finding by the jury that the place so described was out of the jurisdiction of any State, it was impossible for the court to determine such to be the fact. If it was not competent for the Supreme Court, from such a description of the place as was given in Jackelow's case, to say that the court had jurisdiction to try the offender, certainly it will not be competent for this court to say that it has jurisdiction to try the defendant for an offense committed 'in the harbor of Guantanamo, in the island of Cuba.' There may be an island called Cuba within the jurisdiction of some of the States of the Union, and, for all that is stated in this indictment, therefore, the place described may be within the jurisdiction of such State. If, as the Supreme Court held in the case referred to, the question whether a certain place is out of the jurisdiction of a State be a question of fact, to be determined by the Jury, then the fact must be averred and proved. No such averment is contained in this indictment, and, upon the authority of the Supreme Court of the United States, the omission must be held to be fatal."

And in *United States vs. Wilson,* Baldw., 78; 28 Fed. Cas., No. 16,730, pp. 699, 717, Mr. Justice Baldwin, on the circuit, held that while an indictment in a federal court need not aver the county in which the offense was committed, it must allege that the offense was committed within the federal district.

Again, in *United States vs. Burr,* Fed. Case No. 14693, Chief Justice Marshall said:

> "The place in which the crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defense."

See also *United States vs. Jackalow,* 1 Black, 484;

Ledbetter vs. United States, 170 U. S., 606, 613.

United States vs. Burns, 54 Fed. Rep., 351, 360.

In *Knight vs. State,* 54 Ohio St., 365, the Supreme Court of Ohio, by Mr. Justice Spear, said (p. 375):

> "It is elementary, we suppose, that an indictment in order to be sufficient, must aver, with reasonable certainty, all the material facts necessary to a conviction. Nothing is to be left to intendment or inference which is necessary to prove in order to make out the crime. *State v. Philbrick,* 31 Maine, 401; *U. S. v. Hess,* 124 U. S., 483; Am. & Eng. Enc. of Law, vol. 19, p. 566, and authorities cited.
>
> "Venue is one of the essentials of an indictment for a number of reasons. One is that it must appear that the court to which the indictment is presented has jurisdiction of the offense. Another that the defendant may be informed of the charge in this respect so that he may be prepared to meet it. A third is that the judgment may be pleaded in bar to any second indictment for the same offense. The *State v. Cotton,* 4 Foster, 143; Bishop's Crim. Prac., p. 225. And that the prosecution must be had in the county where the unlawful act was committed was held by this court in the recent case of *The State v. Knight et al.,* 35 W. L. B., 175.
>
> "It is insisted by counsel for the State that venue sufficiently appears, and that whether it does otherwise or not, it must be inferred that the criminal acts were committed in the county of Wood because it is charged that the defendants made the contract as county commissioners, and the only possible place where such a contract could be made was within the county of Wood. If it were conceded that the commissioners could not legally make such a contract outside the limits of Wood county, yet it would not follow as a legal conclusion that the transaction did not occur outside the county, for manifestly the acts were such as it was possible to commit without the county, especially does it not follow in view of the character of the prosecution. As pithily observed by counsel for plaintiff in error: They cannot be presumed to have followed the law, as they are expressly accused of violating it. To infer that they acted lawfully in this respect in order to support a charge that

they acted unlawfully in another respect would be a strange application of legal presumptions.'

"But, be this as it may, the claim cannot be maintained, for, as already stated, the indictment must be explicit, and leave nothing to mere inference. Am. & Eng. Ency. of Law, vol. 10, p. 567; *Phipps et al. vs. The State,* 22 Md., 380; *The State vs. Leay,* 3 Stewart (Ala.), 123; *Smith vs. The State,* 21 Neb., 552; *U. S. vs. Morrisey,* 32 Fed. Rep., 147.

"It is further argued that, even though the indictment might not be good at common law, yet it is saved by section 7215, Revised Statutes, called the statutes of jeofails. The clauses of that section which bear relation to this question are these: 'No indictment shall be deemed invalid * * * for want of an allegation of the time or place of any material fact, when the time and place have been once stated in the indictment; * * * nor for want of averment of any matter not necessary to be proved; nor for any other defect which does not tend to the prejudice of the substantial rights of the defendant upon the merits.'

"The proposition is not tenable. If allegation of place of the offense had 'once been stated in the indictment,' then by proper incorporation of 'then and there' at other places where allegation of place is wanting, the requirement of certainty might have been assumed, but we have found that the instrument is barren of any allegation of place. Now, can it be said that the place of the offense, *i. e.,* the county, was not necessary to be proven, for how could a conviction be sustained without it? *Neither can it be said that the question of place did not affect the substantial rights of the defendants, for how, if not alleged, could they intelligently prepare their defense, or how could the record serve the defendants as a bar to a second prosecution for the same offense?* In general terms it may be said as to this defect that the indictment fails to aver all the material facts necessary to a conviction. *Lamberton v. The State,* 11 Ohio, 282. And such failure is fatal, as well since the statute as at common law. *Ellars v. The State,* 25 Ohio St., 385.

"The demurrer to the indictment should have been sustained. It was error to overrule it."

5

In *Thayer vs. Commonwealth*, 12 Met., 9, the Supreme Court of Massachusetts, by Chief Justice Shaw, said:

> "There is no doubt that the complaint is erroneous in not stating within what town or county the alleged assault was committed; so that it does not appear that the justice of the peace had jurisdiction."

And, again, in *Commonwealth vs. Barnard*, 6 Gray, 488, the same court said:

> "It does not appear in this complaint that West Brookfield, the place where the defendant is charged with having sold intoxicating liquor, is either a town, or a place within the county of Worcester. It therefore does not appear that any magistrate in this county, or any court held in this county, has jurisdiction of the offense set forth in the complaint. * * * Judgment arrested."

In *State vs. Bacon*, 7 Vt., 219, the Supreme Court of Vermont said (p. 222):

> "Every indictment must contain direct allegations, with *time and place*, of every fact necessary to constitute the offense. * * *
>
> "Now this indictment is entirely destitute of any allegation when or *where* the stove or saddle were procured, or whether it was ever in the county of Bennington. It shows no offense in the State or county where the indictment was found. Judgment arrested."

In *People vs. Higgins*, 15 Ill., 110, the Supreme Court of Illinois said:

> "The first count was bad for the want of a proper venue. It does not state in what county the offense was committed. It is as essential to an information that a proper venue be laid, as to a declaration or an indictment."

So in *State vs. Searcy,* 4 Tex., 450, the Supreme Court of Texas held (p. 451):

> "There is no *venue* laid in the indictment, to the facts charged as constituting the offense. And this is *a fatal defect,* for which the indictment ought to have been quashed, or the judgment arrested, on the motion of the defendant."

And again, in *State vs. Johnson,* 32 Tex., 96, the same court said:

> "The motion to quash the indictment in this case was properly sustained. There is no allegation in it of either the *time* or the *place* of the commission of the offense. The first is necessary, that it may appear from the charge it is not barred by the statute of limitations. The other is indispensable, that the court may know whether it has jurisdiction of the cause."

In *Connor vs. State,* 29 Fla., 455, the Supreme Court of Florida, held (p. 481):

> "It is a settled rule that if the indictment or information is uncertain, or repugnant to itself, as to the county, or other jurisdictional locality, of the commission of the offense, or, in other words, as to the venue of the offense, it will be held insufficient."

In *State vs. Beebe,* 83 Ind., 171, the Supreme Court of Indiana said (p. 172):

> "The defendant moved the court to quash the affidavit and information, upon the ground that no venue was named in the affidavit. The motion to quash was sustained and the defendant discharged.
>
> "Error is assigned upon the decision of the court quashing the affidavit and information.
>
> "An indictment must, in some manner, name with certainty the county and State in which the offense charged was committed.
>
> "This may be done in the body of the indictment, or may be first stated in the caption, and afterwards

referred to in some appropriate way in connection with the venue of the offense. In charging offenses, the same certainty is required in the affidavit and information that is necessary in an indictment. Moore's Criminal Law, section 134; *Walker v. State,* 23 Ind., 61; R. S. 1881, section 1731.

"As an information must be based upon an affidavit, it will be quashed when the affidavit is insufficient. Moore's Criminal Law, section 135; *State v. Cuppy,* 50 Ind., 291; *Davis v. State,* 69 Ind., 130.

"As has been seen, the affidavit filed in this cause did not either name, or in any other manner distinctly indicate, the State in which the alleged offense was committed. It was for that reason insufficient to support the information based upon it. There was, consequently, no error in quashing both it and the information."

And in *State vs. Bushey,* 84 Me., 459, the Supreme Court of Maine said (p. 460):

"The case finds that the respondent was tried upon the second count in an indictment, in which count it is alleged that he unlawfully transported liquors on a certain day 'from Burnham in the county of Waldo to Clinton in the county of Kennebec.'

* * * "A motion in arrest was filed and overruled, and exceptions taken. The question on such motion is whether any part of the offense is alleged to have been committed in the county of Kennebec. Upon the rules of criminal pleading, we think not. The termini named are border towns in different counties. The transportation was 'to' the town of Clinton, not into or within it. Going to a line is not going beyond it—is not crossing the line. The description is of the territory of towns and not of villages or settlements. Kennebec county is excluded from the transportation. Very likely there is a route for travel from one of the towns named to the other without crossing into Kennebec county.

"To, from, or by, are terms of exclusion, unless by necessary implication they are manifestly used in a different sense. Such is the rule of construction even

> in civil cases. * * * But, in all matters of criminal pleading, the want of a direct and positive allegation in the description of the substance, nature or manner of the offense, cannot be implied by any intendment, argument or implication whatever. The charge must be laid positively and not inferentially. * * * *Exceptions sustained.*"
>
> See also *State vs. Landry,* 85 Me., 95, 96.

Again, in *Commonwealth vs. Phelps,* 170 Pa. St., 430, the Supreme Court of Pennsylvania said (p. 432):

> "In this case the complaint on which the conviction is based is fatally defective; the foundation will not support the superstructure. The defect consists of the omission from the complaint of a jurisdictional fact. The written complaint in this case fails to show that the acts mentioned in it were committed in Lackawanna county."

In *State vs. Chamberlain,* 6 Nev., 257, the trial court allowed the indictment to be amended by alleging the venue of the crime, but the Supreme Court of Nevada on writ of error reversed the judgment, saying (p. 259):

> "The defendant was indicted by the grand jury of the county of Elko, for the crime of murder. The indictment found and presented by them containing no allegation to the venue or locality of the crime, a motion was made before the district court for leave to amend it in that particular, which being allowed, the addition was made and the defendant arraigned and put upon his trial, convicted of murder in the second degree and sentenced in accordance with law. Upon the appeal it is claimed the court below erred in allowing the amendment, and in trying the defendant upon the indictment so amended.
>
> "This point we think well taken. An allegation of the county wherein a crime is committed is manifestly material, as much so as any fact constituting the body of the offense itself. It has always been held necessary by the courts, and indictments have

> invariably been held insufficient which did not in some way state the locality of the crime. * * *
>
> "True, the statute (Stats. 1867, 126) prescribes a form from which the venue seems to be omitted, but it will be observed the section following that prescribing the form requires the statement of all essential facts. This last section we think should control the mere form set out in the prior section * * *.
>
> *"The courts have no more authority to add any material charge, accusation or allegation to it than they have to find the bill in the first instance.* * * *
>
> "The judgment must be reversed and as the original indictment is radically defective, the court below will submit this case to another grand jury."

So important do the courts regard the averment of the locality of the offense, that if there is any ambiguity in its wording, the indictment is held defective in substance, and judgment thereon reversed. Thus in *Bell vs. Commonwealth,* 8 Gratt., 600, the General Court of Virginia held (p. 604):

> "There is a defect in the indictment, in not setting forth with sufficient certainty the county in which the larceny was committed, for which the judgment must be reversed. * * * Two counties had been previously mentioned before the county in which the larceny was committed is stated by the words 'in the county of aforesaid,' without stating to which of the previously named counties the word 'aforesaid' had reference. This manner of stating the county where the theft was committed is insufficient. 1 Chitt., Cr. Law, 160; Archbold's Pleading and Evidence in Criminal Cases, 49; 2 Gabbett's Cr. Law, 205; 1 Wms. Saund., 308, n. 1. * * * All the authorities agree that the indictment is bad, and for this error the judgment must be reversed."

And in *Kennedy vs. Commonwealth,* 3 Bibb., 490, the Court of Appeals of Kentucky said:

"On the part of the Commonwealth it is contended that the word 'there," as used in the latter part of this charge [indictment], refers to the county mentioned in the margin of the indictment; and thus by relation fixes the place where the offense was committed with sufficient certainty and precision. * * * The authorities referred to on the part of the Commonwealth * * * do not support the position that the word *there* will refer to the county named in the margin, where it has not been repeated in the body of the indictment. Indeed, an inference diametrically opposite to this position is clearly deducible from some of these authorities; for it is said to be holden that the want of an express allegation of the place where the offense happened is not supplied by putting it in the margin of the indictment, unless it go farther, as by adding *in comitatu predicto* or the like. 3 Bac. Abr., 550; 2 How. P. C., ch. 25, sec. 34.

"In this case the obvious relation of the word *there* in the charge of committing the battery, is to the place where the assault was made; and as there is evidently no place alleged where the assault was made, either expressly or by any words of implication or reference, it results that there is no place named to which the word *there* can relate.

"That the want of a venue is a substantial defect in the indictment, cannot be doubted. It is held to be so in England, because the grand jury are sworn to inquire for the body of the county, and therefore cannot regularly by the common law present any offense which does not arise within the county for which they are returned.

"The same reason holds here, *and is fortified by the consideration that the courts themselves have no jurisdiction over offenses committed out of their respective circuits.* Judgment reversed."

Again, in *Jane vs. State*, 3 Mo., 45, the Supreme Court of Missouri said (p. 46):

"It is clear law, and has been so adjudged by this court (2 vol. Mo. Rep., p. 228, *State v. Hardwick*),

> that if the facts be stated as to time or place, with repugnancy or uncertainty, the indictment will be bad; and if two times or places have been previously mentioned, and afterwards a part is only laid, 'then and there,' the indictment is defective, because it is uncertain to which it refers; and it is no answer to the objection to say, that 'then and there' will refer grammatically to the last antecedent time and place. It must be certain to every intent. This is peculiarly the doctrine in capital cases, and felonies of a high grade."

And in *State vs. McCracken*, 20 Mo., 411, the same court held (p. 412):

> "The court did not err in quashing this indictment. * * * Here, the county of Hickory is named, and also the county of Polk—two counties mentioned in the body of the indictment, and the offense is stated to have been committed 'at the county aforesaid,' without showing certainly which county; this, according to the case of *The State v. Hardwick*, is not sufficient. The same rule in regard to indictments is again laid down by this court in the case of *Jane v. The State* (3 Mo. Rep., 63). When two different times and two different places are mentioned in an indictment, and a material fact is afterwards averred, it will not be sufficient to give venue to such fact, by stating 'then and there,' only; for it will not do to say that, grammatically, 'then and there' refer to the last cedent time and place. Upon looking into this indictment we are satisfied the circuit court committed no error in quashing the same."

In *State vs. Brown*, 12 Minn., 490, the Supreme Court of Minnesota said (p. 492):

> "The defendant, tried and found guilty, moved in arrest of judgment, because, 1, the indictment does not charge an offense * * * We think the indictment bad—while our statute dispenses with mere formality, or technicality, it requires certainty in every material allegation or charge. * * *

"It does not positively allege where the offense was committed. The word 'there' is in indictments used to refer to a place before particularly designated; but in this case, the venue or place of the commission of the offense, is not positively alleged, or certainly indicated. Without reference to any place or county, except as a description of the court or of the grand jury, or as a description of the office held by the defendant, it is alleged, that he *'then and there,'* did extorsively demand, etc. *There,* in the connection here used, is not equivalent to the expression 'in the county aforesaid,' and does not certainly show the county in which the crime was committed. See *Kennedy v. Commonwealth,* 3 *Bibb.,* 490."

In *Cain vs. State,* 18 Tex., 392—

'the indictment after 'State of Texas, county of Fayette,' and the usual commencement, charged 'that James Cain, late of Travis county aforesaid, yeoman, with force and arms in the county aforesaid, on, etc., did then and there feloniously steal, take, and carry away,' etc. Motion in arrest of judgment on the ground that the indictment did not charge that the offense was committed in the county of Fayette."

The court held:

"The rule of law applicable to indictments, is, that if the fact be stated as to time and place with repugnancy or uncertainty the indictment will be bad. Whart., Am. Cr. L., 113, 143. In this indictment there is manifest repugnancy in the statement as to the place or county where the offense was committed. There was good ground in arrest of judgment. There was error, therefore, in refusing to sustain the motion on the ground of repugnancy and uncertainty in stating the venue.'

And in *Commonwealth vs. Wheeler,* 162 Mass, 429, the court said:

"The defendant in the case at bar could not legally be convicted in the county of Worcester of the of-

> fense of which he was charged unless the indictment set forth that it was committed in that county. The indictment begins with the words 'Commonwealth of Massachusetts, Worcester, *ss:*' The defendant is described as of Buckland, in the county of Franklin, and the offense is alleged to have been committed 'at Westminster, in said county.' According to the authorities, such an indictment is bad, either because, two counties having before been named, it is uncertain to which the words 'in said county' refer, or because these words refer to the last antecedent, namely, the county of Franklin. 2 Hale, P. C., 180; 2 Hawk, P. C., c. 25, sec. 34; 2 Gabb. Crim. Law, 210; 1 Chit., Crim. Law (2d ed.), 194; *Elnor's case,* 1 Cro. Eliz., 184; 1 Wms. Saund.,308, n.; *Regina v. Rhodes,* 2 Ld. Raym, 886; *The King v. Moor Critchell,* 2 East, 66; *State v. McCracken,* 20 Mo., 411; *Cain v. State,* 18 Tex., 391; *Bell v. Commonwealth,* 8 Grat., 600.
>
> * * * * * * *
>
> "In the case at bar we are of opinion that the indictment does not allege with sufficient certainty that the offense charged was committed at a place within the county of Worcester, and that the motion to quash should have been granted. *Exceptions sustained.*"

Thus in the case at bar, the complaint containing no allegation as to where the alleged acts of adultery were committed and no averment that such acts were done within the jurisdiction of the court, must be held fatally defective and incapable of supporting the judgment rendered.

III.

Fifth Specification of Error.

The substantial defects in the complaint were not waived by defendants' plea, nor aided by judgment. Objection may be raised at any stage of the proceedings and by appeal or writ of error.

The Supreme Court of the Philippines declined to consider the objections raised to the sufficiency of the complaint herein, saying (Rec., 27):

> "Objections to the complaint based upon an insufficient statement of the facts constituting the offense cannot be considered here, because they were not presented in the court below" (citing *U. S. vs. Sarabia*).

In *United States vs. Sarabia*, 3 Off. Gaz., 403, the case cited in support of their decision here, the Supreme Court of the Philippines said (p. 404):

> "We hold that no objection to a complaint based upon a defective statement either in matter of form *or substance* of 'the acts or omission complained of,' as required by article 6, paragraph 3, of General Orders No. 58, not made in the court below, can be used in this court to obtain a reversal.
>
> "It may be said that this would require us to sustain a conviction where there was no complaint at all in the lower court. It is not possible that such a case could arise. The judges of the courts of first instance are required by act No. 136 to be men learned in the law. It is impossible to conceive of such a judge rendering a judgment of conviction where there was no complaint at all upon which to base it. And, further, it is impossible to conceive of such a judge rendering a judgment of conviction upon a complaint which he himself did not understand."

Now this doctrine, that substantial defects in the information or complaint are cured by judgment and cannot be considered on appeal, is not only against authority, but is directly contrary to the Philippine criminal law. Sections 9 and 10 of General Orders No. 58, 1900, *supra*, constitute the statute of jeofails and amendment of the Philippine criminal law. Section 9 provides:

> "SEC. 9. The information or complaint may be amended in substance or form, without leave of court, at any time before the defendant pleads; and thereafter, *during the trial, as to all matters of form*, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant."

Section 10 is as follows:

> "SEC. 10. No information or complaint is insufficient, nor can the trial, judgment, or other proceedings be affected, by reason of *a defect in matter of form* which does not tend to prejudice a substantial right of the defendant upon the merits."

By the ordinary principles of interpretation the meaning of these statutes is plain, that *no* amendment to information or complaint *in matter of substance* can be made after the defendant pleads; and that an information or complaint defective in *substance* is insufficient, and judgment thereby affected.

But, whatever the local law may be, this case rests upon higher ground. Conviction on a complaint so defective as this violates the fundamental constitutional guaranties which this court has held in *Kepner vs. United States*, 195 U. S., 100, apply to the Philippine Islands, and which were expressly enacted as a Bill of Rights in the Philippine Civil Government act of July 1, 1902 (32 Stat., 691, 692). By them no person can be deprived of life, liberty, or property, or held to answer for a criminal offense, without due

process of law; and every person is entitled to be informed of the nature and cause of the accusation against him. Both of these guaranties are violated by the judgment in this case.

As said by Mr. Bishop in his work on Criminal Procedure (4th ed., vol. I, sec. 98*a*):

> "Under every sort of constitution known among us, an indictment which does not substantially set down, at least in general terms, all the elements of the offense—every act or omission which the law has made essential to the punishment it imposes—is void. And, besides this, under most of our constitutions the allegation must descend far enough into the particulars, and be sufficiently certain in its frame of words, to give the defendant reasonable notice of what will be produced against him."

And again the author says (*ibid.*, secs. 77-88):

> "Every wrongful fact, with each particular modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment. This doctrine is fundamental. Originating in natural reason and abstract justice, it has been adopted into the common law and confirmed by our written constitution.
>
> "It is a truth palpable, requiring no argument, that there cannot be a punishment without an accusation. If, with no charge against one, he is imprisoned or hung, we speak of the infliction as an outrage, and no one deems it correct in language to say that he is *punished*.
>
> "If a man is charged with acts legally punishable by imprisonment, then is hung for them, he is not punished, he is murdered. It is no more just to take his life on an accusation of something to which the law attaches a less penalty, than to do it with no accusation. And it makes no difference that in fact he is guilty of more than is charged, or more than is proved. Though what is set down against him is a part of a larger crime, still, if the indictment is silent as to the remaining part, he can no more be

punished for the whole than if no part of it had been alleged. To punish him for all, where he is not charged with all, is to punish him without accusation. Hence the rule which our jurisprudence has adopted from natural reason and justice, that the indictment must allege every fact and modification of fact legally essential to the punishment to be inflicted.

"This doctrine pervades the entire adjudged law of criminal procedure. It is made apparent, not alone by a simple case, but by all cases. The illustrations of it are without end."

* * * "The result is that in every case, with no exception, the common law requires each individual thing which itself or a statute has made an element in that wrongful aggregation out of which the punishment proceeds, to be alleged in the indictment. The court, in adjudging the punishment, can take into its consideration nothing except what is specifically charged."

"The right of a person pursued for crime, to have each several thing on which his punishment is to be founded set down against him in allegation, is with us secured by constitutional guaranties."

"By the United States Constitution, 'in all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation.' But the 'nature and cause' of an accusation are not stated where there is an omission of anything necessary in law to justify the punishment."

As said in *United States vs. Cruikshank,* 92 U. S., 542, 557:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills,* 7 Pet., 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States v. Cook,* 17 Wall., 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.'"

And again, as said by Chief Justice Marshall in *The Hoppet vs. United States,* 7 Cr., 389, 394:

> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced."

Defects in substance, such as exist in this complaint, are not cured by statute of jeofails. Section 1025, United States Revised Statutes, is substantially the same as the Philippine statute of jeofails, *supra.* Thus in *United States vs. Carll,* 105 U. S., 611, the court in holding the indictment insufficient for want of an allegation that the defendant knew the instruments to be forged, said (p. 613):

> "The omission is matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of sec. 1025 of the Revised Statutes."

And in *Markham vs. United States,* 160 U. S., 319, Mr. Justice Harlan, delivering the opinion of the court, said (p. 326):

> "It is proper to add that sec. 1025 of the Revised Statutes providing that 'no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant,' is not to be interpreted as dispensing with the requirement in sec. 5396 that an indictment for perjury must set forth the substance of the effense charged. An indictment for perjury that does not set forth the substance of the offense will not authorize judgment

upon a verdict of guilty. *Dunbar v. United States*, 156 U. S., 185, 192."

And in United States *vs.* Morrisey, 32 Fed. Rep., 147, Judge Thayer said (p. 153):

"In answer to the suggestion made on the argument of the motion that the defect in the indictment is cured by the statute of jeofails, section 1025, Rev. St. U. S., it is sufficient to say that the statute in question will not remedy a defect in an indictment of such a radical nature as a failure to charge an offense."

See Also:

United States vs. Conant, 25 Fed. Cas., No. 14844, pp. 591, 593.

United States vs. Noelke, 1 Fed. Rep., 426, 433.

United States vs. Davis, 6 Fed. Rep., 682, 684.

"Under our Constitution there is a limit to the power of these statutes in criminal cases; as, while they may cure formal defects in an indictment, they cannot validate one which in its allegation of facts omits any essential element of the crime."

Bishop's Crim. Pro., sec. 706*a*.

The defects in this complaint are not such as can be waived by pleading to it. That indictment or complaint set forth all the facts and contain all the elements necessary to constitute the offense, is requisite to due process of law. It is not a requirement that can be waived by the accused. As said by Judge Parker in *Ex parte McClusky*, 40 Fed. Rep., 71, 74, when the accused pleaded guilty and were afterwards discharged on writ of *habeas corpus:*

"Due process of law, in a case like the one charged against petitioners, means compliance by the Government with a fundamental requisite, such as that the party shall be charged with the crime in the way provided by the Constitution and laws of the United States. Liberty, under such Constitution and laws,

> is an inalienable prerogative, of which no man by mere agreement can divest himself. Any divestiture not occurring by due process of law is null. Whart. Crim. Law, (9th ed.) § 145. Mr. Cooley in Constitutional Limitations, (page 182) says: 'A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the province of individual consent or agreement.' This means that, by individual consent or agreement, fundamental rights cannot be waived. The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties."

Nor are defects of this nature cured by verdict or by judgment.

The Hoppet vs. United States, 7 Cr., 389, 394.

As said in *United States vs. Hess,* 124 U. S., 483, 488:

> "The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud are wanting. *Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.*"

And objections based on such defects may first be raised on appeal or writ of error.

Cochran and Sayre vs. United States, 157 U. S., 286.
United States vs. Cook, 17 Wall., 168, 174.
United States vs. Dunbar, 156 U. S., 185, 192.

Especially is this true in the Supreme Court of the Philippine Islands, where on appeal the case is opened up *de novo* with full power to enlarge the judgment and increase the punishment, as was done in the case at bar.

Kepner vs. United States, 195 U. S., 100.
Trono vs. United States, 199 U. S., 521, 534.

As the Supreme Court of the Philippines went so far in this case as to impose an additional sentence, it was surely

their duty to examine the complaint as to its sufficiency to sustain their judgment.

The extent to which the Philippine Supreme Court have carried their ruling that they would not consider objections raised to the sufficiency of the complaint in matters of substance is shown in the case of *United States vs. Bibal*, 3 Off. Gaz., 371, where the complaint on which the defendant was tried and convicted was not sworn to. The court, however, held that this was a mere defect of form, and at any rate they would not set aside the judgment on that account, saying:

> "It is suggested that the complaint presented by a private person not having been sworn to is void. The provincial fiscal, on February 3, 1903, certified in writing that he found the complaint sufficient, and named three other witnesses for the prosecution. Whether this amounted to an adoption by him of the complaint, and made it an information which did not require an oath, it is not necessary to decide. *The want of an oath was, in any event, a defect of form which did not affect the substantial rights of the defendant on the merits. Article 10 of General Orders, No. 58, does not permit a judgment to be set aside for such a defect.*"

Even more remarkable is the case of *United States vs. Cajayon*, 2 Off. Gaz., 157, in which the majority of the court held that an information which did not allege any killing was sufficient to support a conviction of murder. In this case nine persons were tried and convicted of murder upon the following complaint (p. 160):

> "The undersigned charges Emiliano Cajayon, Candico Aguilar, Felix Aguilar, Mariano Aguilar, Domingo Castillo, Pioquinto Cajayon, Quintin de Leinos, Tomas Ramiriz and Gregorio Tria, of the town of Salinas, and Pantenople of the province of Batangas, of the crime of murder, committed as follows:
>
> "That the said Emiliano Cajayon and his compan-

> ions above named, armed with guns, on the night of the 21st of March 1901, in the town of Lubang, of this province, entered the house of Dona Ana Muriel, seized Tranquilino Torres, and, after having tied his hands, carried him toward the beach; four days later the remains of the body of Tranquilino Torres were found on the said beach; this against the statute in the case made and provided."

When the case came before the Supreme Court of the Philippines, the Solicitor General filed a petition asking because of the insufficiency of the complaint, that the judgment be set aside and that the court direct the filing of a new information for the crime of murder. This petition the court denied in the following language (p. 159):

> "In the information upon which the prosecution is based some deficiency is to be observed in the statement of the facts constituting the crime of murder with which the defendants are charged, and on this account the Solicitor General asks that the proceedings be set aside, that the judgment be reversed, and that the court direct the filing of a new information for the crime of murder, the commission of which is disclosed by the evidence.
>
> "No objection was made to the information by the defendants or their attorney, either in the court below or in this court. They failed to register any exception or protest on the ground of the nullity of the information or of the trial, nor has any application been made for a new trial because of such deficiency. For this reason, in view of the result of the proceedings, and in view of the fact that the offense charged has been properly defined and designated in the information in question, the petition of the Solicitor General must be denied."

Mr. Justice Cooper, however, dissented, saying (p. 160):

> "The solicitor general in his brief requests the annulment of the judgment of the Court of First Instance and asks that the case be remanded to the lower court, with instructions that the court direct the

presentation of a new complaint for the crime of *asesinato* or murder. He is of opinion that the complaint upon which the defendants have been convicted is insufficient to sustain a conviction of this offense. In this view I concur."

He then quotes the complaint, *supra,* and then adds:

"The complaint does not comply with the requirements of section 6 of the General Orders No. 58. In defining the requisites of a complaint or information, it is provided in paragraph 3, that 'the complaint should show the acts or omissions complained of as constituting the crime or public offense in ordinary and concise language.'

"*It does not appear from the complaint that the defendants did anything more than to seize and carry off the deceased, and that his body was afterwards found. This would not constitute the offense of murder.*

"*While there may be a strong inference from the circumstances set forth in the indictment that the defendants did actually kill the deceased, yet the complaint wholly fails to state this most important element.*

"It is to be further observed that the complaint does not state that the offense was committed with *alevosia* or with premeditation. These are qualifying circumstances of the offense of murder and have the effect of raising ordinary homicide to that of murder. Had it been directly alleged in the complaint that the defendants killed the deceased, this would not constitute murder in the absence of the qualifying circumstance either of *alevosia* or premeditation.

"Article 404, Penal Code, provides that he who shall kill another without the attendance of these circumstances is guilty of homicide and is punishable with the penalty of *reclusión temporal,* under which the highest penalty that can be assessed is twenty years of *reclusión temporal.*

"The court in its decision not only held the complaint sufficient to show a killing by inference, but

entirely ignores the omission to state that the killing was with premeditation or *alevosia*. The defendants have been found guilty not only of the killing of the deceased, but of its having been done with *alevosia*, and the penalty of life imprisonment has been assessed—the penalty fixed by article 403 for the crime of murder.

"It is immaterial in my opinion whether there was an objection or demurrer made to the complaint in the lower court, or whether objections have been made in this court The complaint is fatally defective."

There is no evidence in the case to show that the plaintiff in error, Serra, knew that Señora Obleno was married. It appears that when a young girl she went through a marriage ceremony with Murtiga, being forced thereto by her father's threats and beating (Rec., 16, 17). She made no response at the time the marriage ceremony was performed (Rec., 15). There is direct testimony to show that they never lived together in the marriage relation (Rec., 15, 16, 21, 22). She always lived at her mother's house (Rec., 11, 15), and has received no support from her husband (Rec., 21). Serra was not living there when the marriage ceremony was performed (Rec., 10, 17), and did not come to the town until 1899, some three years later (Rec., 10, 11, 17). Murtiga admits that, although living for four or five years in the same town, he has never spoken to Serra about his living with his wife and never did anything to oppose it. These circumstances probably account for the failure of the complaint to allege that Serra knew of the marriage. Murtiga lived for years in the same town, knowing the relations these plaintiffs in error sustained to each other, all without protest, permitting them to continue living together until two children were born to them, when suddenly he filed the complaint. Under these circumstances the sentence imposed by the court below seems unusually severe, and is distressingly so when we consider its grievous hardship to

the little child, three years old, whom it deprives of both its parents.

For the reason stated, we submit that the judgment herein of the Supreme Court of the Philippine Islands should be reversed, with directions to dismiss the complaint.

Respectfully submitted,

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